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An unending variety of topics

Thursday, May 31, 2007

Why legal procedure is central to politics

"Political power comes out of the barrel of a gun," Mao Zedong infamously said. This was true in the civil wars Mao fought and was too often true in the lawless way he oppressed his people. It is generally true in the anarchy of international relations, and would be true for individuals if they lived without law. People of practically all political stripes agree that the problem of force is one of the most important political problems, and I suspect most would agree with me that it is the most important problem. It is also the central problem addressed by the law.

We can start to understand both law and politics by understanding a bit of the highly evolved common law in a situation that lies close to anarchy: the obligatory gunfight in the old Western movies. With my habitual lawyerly habit of "issue spotting," I've noticed how the good guys in these old Westerns almost always, if often barely, follow the common law of self-defense. The white hat waits until the villain reaches for and grabs his gun -- showing intent to shoot -- before he grabs his. This heroic habit illustrates one of the great summaries of the substance of the common law -- namely "thou shalt not initiate force" -- or, in a more peaceful setting, fraud. If one had to summarize the substantive parts of the common law into one sentence, that would be it -- "thou shalt not initiate force or fraud."

This is not to say that one can logically deduce all important parts of law or politics from such a principle -- a common mistake of ideologists. One can no more deduce the content of the law from simple principles than one can deduce the specific sequence of an animal's genetic code from any few simple rules. Both, in mathematical terms, have an irreducible Kolmogorov complexity and any of these kinds of summaries are quite lossy. But it does turn out that almost all of the substantive common law operates in close proximity to that libertarian principle.

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Nick Szabo

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There are some other good ways to summarize the common law. "The right to be left alone" is a good brief description of our rights under criminal, tort, and property law -- in other words these are generally systems of negative rights rather than of positive rights to compel another person's affirmative effort. Since we often don't really want to be left alone we also have contract law, which generally operates according to the principle of "keep your promises", inheritance law, "respect a dying man's wishes, and if you don't know them he meant to leave his wealth to his family," and so on.

Back to our movie: let's say we come into the theater just as our hero is firing his gun. He has already drawn his gun while the villain is still bumbling around. Our hero shoots first and our villain crumples to the ground. If we didn't know this was an old Western, where the hero always draws faster despite drawing second, a reasonable guess would be that our killer was able to shoot first because he drew first, and is thus a murderer.

Only in full context do we see the initiation of force and a response to it. In isolation, the response to force is often indistinguishable from the initiation of force. We often can't know for sure whether an act of coercion is an unlawful initiation of force or a lawful response to it until we've seen the entire film (and in modern Hollywood, not even then, though I digress). Or, to change metaphors and introduce a bit legalese, we often don't have *probable cause* to believe someone has initiated force until we've assembled some pieces of the puzzle. Learning to some even greater degree -- *clear and convincing evidence* in some private cases and *beyond a reasonable doubt* in criminal cases -- who initiated force requires even more pieces.

Furthermore, to achieve justice -- to deter, to exact retribution, to make whole the victim, or to heal the sick criminal, whichever one or more of these we take to be the goal of justice -- we must almost always respond to force with force. Taken in isolation that response will itself look like an initiation of force. Furthermore, to gather the evidence we need in most cases to achieve sufficient high levels of confidence -- whether balance of the probabilities, clear and convincing evidence, or beyond a reasonable doubt -- we often have to initiate force with third parties -- to compel them to hand over goods, to let us search their property, or to testify. If politics could be deduced this might be called the Central Theorem of Politics -- *we can't properly respond to a global initiation of force without local initiations of force*.

Again keeping in mind that we are leaving out many important exceptions and details, we might summarize good legal procedure -- and more abstractly, the way a good political system should respond to force -- as follows:

(1) An initiation of force might have occurred

(2) Learn enough, without responding with force of our own, until we have probable cause to believe an initiation of force has occurred.

(3) Respond with our own force in order to arrest the persons, valuables, and evidence involved, and engage in the trial(s) and other procedures necessary to convince those most highly knowledgeable about the case, and if it is important enough the world generally, that an initiation of force indeed occurred.

(I'm neglecting, of course, the controversial issue of preventing force by initiating force -- in the international context by invading Iraq to prevent supposed weapons of mass destruction, in the individual context by capturing a terrorist before they've actually committed an act of terror. This is dangerous territory that goes beyond the general responsive workings of legal procedure, and will be hopefully a topic I address another day).

In Hollywood our hero has a quick eye and thereby instantly achieves probable cause that our villain has reached for his gun and is threatening to fire. In reality, the evidence is usually far more dispersed and we must be far more careful, lest our supposed response to force actually be an initiation of force.

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Since force is the central problem of politics, a political system, whether proposed or real, that cannot distinguish an initiation of force from a proper response to force -- that cannot distinguish an arrest of a person from a kidnapping, an arrest of goods from theft, and so on -- is worth less than the paper it's written on. And if it merely waves its hands and invokes the magic of "the government" or "the market" to solve all such problems, it is extremely lame -- and quite at odds with how our highly evolved common law legal procedures actually work. The common law does not, as the law of self-defense suggests, necessarily require "the government" for a legally forceful response to force. But neither, as we shall now see, do its legal procedures operate in any way resembling the laws of economics in a voluntary market.

Recall our Central Theorem of Politics -- *we can't properly respond to a global initiation of force without a local initiation of force*. We could deduce, if law could be deduced, that legal procedure thus might be full of local initiations of force -- and in fact it is. Legal procedure, in sharp contrast to good substantive law, does not involve merely negative rights "to be left alone," but in addition is full of positive rights. It is full of procedures for interfering with persons and property, both with the defendant who might have initiated force and with some third parties who are not accused of initiating force. The right to sue, for example -- necessary for the enforcement of any private substantive right -- is a bundle of positive rights that usually includes the right to compel a jury to sit and the right to compel witnesses as well as a right to compel the the alleged initiator in various ways. Proper response to the initiation of force would be extremely and quite unreasonably hobbled without these coercive mechanisms, these positive rights of legal procedure. And unless the disputing parties have arranged things ahead of time, the exercise of jurisdiction by our "responder to force," the court, is involuntary for at least one of them. Often the responder has to be backed by some kind of police force, or an extreme cases even an army, if justice is to be achieved. It is preventing the abuse of all this power -- including figuring out ways to minimize the power without overly reducing our ability to resond to force -- that is the central problem of politics.

Ideological purists can whine all they want about the supposed injustices of the coercion inherent in legal procedure, but "thou shalt not initiate force" is merely a useful summary of the *substantive* common law and in no way provides a useful summary of the *procedural* common law, much less a principle for its operation. The job of legal procedure -- and of good politics generally -- is to respond to initiation of force with its own local initiations of force in order to achieve justice: to punish the initiator of force and to provide restitution to his victim. Whatever form this response might take -- whether a nation-state making war or enforcing law through its courts, or parties who have previously agreed resolving their dispute through a private court, or a shopping mall security guard arresting a shoplifter, or our quick-draw Western hero -- whatever form response to force may take, it is crucial that law carefully defines the proper ways for making such responeses and that we put limits on these methods to prevent abuses. It's also crucial to realize that any princples by which we might do so will tend to be very different than those of the substantive law being enforced.

Posted by Nick Szabo at 3:27 PM

10 comments:

Daniel A. Nagy said...

I disagree that the proper response to the use of force is indistinguishable from the initiation thereof.

One of the most important (if not *the* most important) part of due process is **recording the ruling** of the arbiter (along with archiving all the evidence weighed in the process of making it) and **making the ruling public**. In many cases, this is enough in itself, since in a society with a high degree of division of labor every individual relies on the trust and cooperation of others. If people become

reluctant to do business with the offender, no force might be necessary. For example, ICC has no power to use or authorize force, but getting on its blacklist is a very strong disincentive.

It is also very interesting to look at another highly evolved, precedent-based legal system: the Shariah. According to Muslim custom, arbitration is a simple service, for a fee. Its final product is the ruling (called fatwa).
It is up to the community, how they follow up on the ruling, but in the case of rulings issued by respected, established muftis, people usually do.
The often vilified hand amputation is more of a stigma than retribution; it will mark the person as an offender for everyone to see.
Advances in technology may very well render such applications of force unnecessary: looking up a person in a database (of *my* choice!) for "fatwas" issued by respected "muftis" (respected by *me*, that is) within milliseconds is not that far-fetched, is it?

There is already a secure and reasonably well-designed (decentralized) infrastructure in place for storing and distributing statements of people about others and evaluating them on the basis of trust: the network of PGP keyservers. I believe that the web of trust has potentially many applications going well beyond establishing identity.

The most important self-defense weapon of the future might very well be the camera-phone or its successor.

2:27 AM

nick said...

Daniel, thanks again for some very cogent comments. I should have said *often* indistinguishable -- thanks for the correction.

As for fatawa: how "the community" responds to such scholarly opinions varies, but it is has certainly been known to include force, up to an including death, after which reputation doesn't much matter. Private law, like self-defense, citizen's arrest, the liberty of house, and so on, usually does not imply the lack of force. That it often seems to in some modern countries is an artifact of the artificial Romanist idea that "the government" has a "monopoly of force" -- but as we see with the shopkeeper's privilege of arrest, the right of self-defense, federalism, and so on, this isn't really true even in the most Romanist of polities. As for reputation-based commercial law, like the ICC and the credit-card chargeback system, this works only to a limited degree, is special to certain arenas, and operates on a background of contract, property, and other commercial law based on forceful remedies. It is wonderful when this can be done but the scope is quited limited.

As my movie example highlights, a photo or film clip taken out of context can be highly misleading. It can condemn the responder to force and thereby reward the initiator of force. The Internet, where most people usually get bored after about a page of text,is like the mass media a truly awful substitute for a jury trial where 12 people must sit down for a very long time and become very aquainted with compelled evidence presented by all parties with substantial interests in the dispute.

I am certainly quite in favor of nonviolent enforcement where it is possible -- that's the prime reason I think up and discuss smart contracts and related technologies -- but even this kind of advance is hardly a universal substitute for the background threat of force in legal procedure, and in politics generally. It is certainly an extreme form of blindness to believe, as many political debates suggest many people believe, that our historical and currently dominant political and legal systems are not based on the threat of force. This also applies to proposed future systems -- whether these involve expanding government scope by nationalization, or shrinking it by privatization, or merely IPOing the government and paying dividends, or monarchy, or even my own nonterritorially decentralized jurisdiction proposal. They all are based on the threat of force, which will, if the political idea is good, hopefully involve far more valuable responses to force than it does initiation of force.

11:59 AM

Daniel A. Nagy said...

Nick,

Thanks for the clarification. I think, we are much closer to agreement by now.

In my view, law (in the broadest sense) is primarily a set of Schelling points; shared knowledge that helps predicting other players' actions.

It is also remarkable that while weapons become more and more deadly, easier to use and more readily available, the actual level of violence is going down in the long term. Unfortunately, I cannot dig up the reference, but I read a study showing that humans are the most peaceful mammals (including herbivores) in that they have the lowest ratio of death due to being killed by others of their own species. I came to think that peace is actually a human (or primate) invention; other pack animals are always at war or in the state of very fragile truce.

However, you still have not convinced me that the basis of legal order has always been and will always remain the threat of force. Especially about this latter part.

3:30 PM

nick said...

"Always will be" is quite a long time, and I wouldn't go quite that far.... Maybe all posthuman robots will come with a switch that automatically puts them into "sleeping" mode when they commit a tort or public nuisance, and they can't wake up until their bank accounts have been deducted for the damages -- or some similar protocol but more sophisticated to account for bankruptcy and endangerment and such. If such things are defined as not constituting force then perhaps there will come a day. :-)

4:57 PM

Daniel A. Nagy said...

In that case, all you have just written, becomes commentary and interpretation to Chairman Mao's concise and to-the-point summary. Don't get me wrong; I am not trying to apply guilt-by-association. Mao could very well have been right about the basis of the legal order and I might be wrong.

But I maintain that reputation is at least as important a deterrent against all things illegal as forceful response. There have been countless occasions in my life (and I am sure, everyone else's) when I chose legal behavior over some seemingly more beneficial illegal behavior because I wanted to maintain my good reputation even though there was no credible threat of force against me.

7:07 AM

nick said...

I am skeptical about your last claim beyond examples that involve your close friends and relatives. Do you have examples wrt your reputation with strangers? (You can file off the serial numbers if you like, but keep the law the same as you understood it).

12:44 PM

nick said...

BTW, for the curious I wrote a whole piece on robot law.

1:13 PM

Daniel A. Nagy said...

Here's a most recent example:
I have been paying people in a far-away country in Central Asia to do some programming for me. We have written up a contract to

which both of us stick although there is absolutely no way to enforce it by violent menas: our countries do not have diplomatic relations, commercial arbitration is more expensive than what we could afford, etc. We are doing increasingly sophisticated dealings involving credit, shipping, services, currency exchange and so on, yet all sides keep the rules because we value our reputation.

Now, you may dismiss this example as one involving my close friends, because I found these people through my social network (they are friends of a friend of my girlfriend).

But outside the Western world (even here, in Eastern Europe) that's the norm: Most business that is less trivial than buying mass-produced stuff that you can carry away immediately for cash or debit card payment is *not done* with complete strangers. Given the graph-theoretic properties of social networks, that's actually not much of a restriction.

Fukuyama is just as wrong on trust and social virtues as he was on the end of history. ;-)

3:43 AM

Mike Huben said...

Daniel, all the things you are characterizing as non-violent or non-forceful are premised upon property rights, which are clearly based on force.

Reputation for example. People may withhold interactions due to reputation as an enforcement mechanism. But the only way they may withhold the interactions is if they are forcefully protected from being compelled by property rights (or personal rights.) If I won't let you borrow my lawnmower because you have a poor reputation, what actually stops you from using it is my property rights. And those are forcefully protected.

BTW: your claim that "hand amputation is more of a stigma than retribution" is difficult to believe. Especially since such stigmas are forms of blacklisting, which is commonly used as a form of retribution. It would be interesting to compare amputation to hand tatooing to measure the difference.

6:14 PM

Alrenous said...

Without a court system an individual has no protection against crimes aside from their own strength of arms.

A company selling a court service, so that you can charge criminals, would likely require that you agree to have your possessions searched at the sole discretion of that company. Search and seizure does not have to be an initiation of force. Confinement similarly.

The issue, then, is only with seizing the goods of neither the criminal nor subscribers. First, I suspect this is rare. Second, if they are truly uninvolved with the crime, they will probably agree to sell.

Competition in court systems may result in payment for seized good regardless. Or not - we'd have to try it.

Internationally one deters acts of force, just like one does privately. If a country is incapable of deterring, and incapable of punishing acts of force, then a pre-emptive strike would almost certainly have been defeated anyway.

If preparing to be a terrorist can be distinguished, it can be criminalized, and you can preempt terrorism. If not, you can't anyway.

2:04 PM

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